LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
OCT 10 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1965

No. 544

IN THE MATTER OF BLACK RANCHES, INC., A Nebraska Corporation, Debtor, in Corporate Reorganization Proceedings under Chapter X of the Federal Bankruptcy Act.

ROE R. BLACK, AVIS C. BLACK, ROE C. BLACK, BLACK RANCHES, INC., a corporation, Debtor, and THOMAS HART FISHER,

Petitioners,

vs.

ANNA C. BRANDO, as Administratrix of the Estate of MARLON BRANDO, SR., Deceased, and MARLON BRANDO, JR.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

ALLEN E. SUSMAN
444 United California Bank Bldg.
9601 Wilshire Bldg.
Beverly Hills, California 90210
WARREN K. URBOM
1200 Sharp Building
Lincoln, Nebraska
Attorneys for Respondents

GANT PUBLISHING CO., Lincoln, Nebraska

IN THE

Supreme Court of the United States

October Term, 1965

No. 544

IN THE MATTER OF BLACK RANCHES, INC., A Nebraska Corporation, Debtor, in Corporate Reorganization Proceedings under Chapter X of the Federal Bankruptcy Act.

ROE R. BLACK, AVIS C. BLACK, ROE C. BLACK, BLACK RANCHES, INC., a corporation, Debtor, and THOMAS HART FISHER,

Petitioners,

vs.

ANNA C. BRANDO, as Administratrix of the Estate of MARLON BRANDO, SR., Deceased, and MARLON BRANDO, JR.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

Respondents, Anna C. Brando, as Administratrix of the Estate of Marlon Brando, Sr., Deceased, and Marlon Brando, Jr., respectfully pray the Court's denial of petitioners'

application for this Court's writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The citation of opinions below is adequately set forth in the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

Whether the trial court and the Court of Appeals, in allowing respondents' claims in the amount of $110,117.40 as unsecured claims and in denying petitioners' alleged set-offs and counterclaims in the amount of $99,108.50, prevented petitioners from relying upon an express contract theory to establish petitioners' set-offs and counterclaims and whether the trial court was clearly wrong in finding that the respondents were not guilty of fraud?

STATEMENT OF THE CASE

On October 22, 1954, in the District Court of the United States for the District of Nebraska, five creditors instituted proceedings against The Black Ranches, Inc., a Nebraska corporation, pursuant to the corporate reorganization provisions of Chapter X of the Federal Bankruptcy Act. The trial court in a meticulously detailed opinion allowed various claims of respondent against the debtor corporation as general unsecured claims in the amount of $110,117.40 and denied petitioners' set-offs and counterclaims in the amount of $99,108.50.

To support their alleged set-offs and counterclaims, peti-

tioners offered and the trial court received evidence, among which was a resolution in the corporate minutes. The court, considering the resolution, stated:

> "What exhibit 263 (the corporate minute book) reflects is that the Directors, so far as the corporate entity was concerned, had made a record of their declaration of what should be the rate. Now I take it, except for the impact of Mr. Brando's ostensible participation in that meeting, which I understand him to here deny or to question as a witness, that there is no evidence of a bilateral contract upon the subject." (Supp. R. 123)

In conclusion, the court stated and held:

> "The contention appears to be that such payments were not made, either at the rate of $4.00 per month per head (see corporate resolution, *supra*,) or upon a basis resting upon its regular and fair value. The court considers that position of the objectors not to have been established." (Petition, App. 25)

Petitioners, however, recognizing the weakness of an express contract theory, principally relied upon the quantum meruit theory as evidenced by the pleadings and proof. The Court of Appeals, commenting on this aspect, held:

> "Having relied upon quantum meruit, appellants (petitioners) cannot now switch their primary reliance to the corporate resolution and, thereby, to an express contract theory." (Petition, App. 25)

The trial court also concluded that $3.00 per head per month was reasonable and that Black Ranches, Inc., had received credit in that amount.

Concerning petitioners' defense of fraud to the respondents' claims, the trial court specifically held that fraud was not proved by the preponderance of the evidence. The trial court, examining in detail the evidence presented by

the petitioners, stated:

> "There was no illegality, wrongdoing, overreaching, or dishonesty in the giving of promissory notes evidencing the debts, and providing a later time for the payment of each note, and for the payment of lawful interest pending such payment." (Petition, App. 8)

ARGUMENT

Petitioners' assertion that the lower courts contravened and violated fundamental federal law is based on propositions which represent an erroneous, if not false, construction of the lower courts' opinions. An examination of the trial court's detailed finding of fact and law reveal that petitioners, in fact, were not expressly or impliedly prevented from presenting evidence of an express contract to establish their set-offs and counterclaims. Similarly, petitioners' assertion of the establishment of fraud has no basis.

We do not question petitioners' citation of cases for the proposition that strict rules of pleading are not applicable to a proof of claim in bankruptcy. However, no amount of strained semantics can convert that proposition as being applicable in the present case. The claim of error simply involves the findings of fact by the trial court which are not to be set aside unless the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. *United States v. United States Gypsum Co.*, 333 U. S. 364, 68 S. Ct. 525, 92 L. Ed. 746 (1948).

Where the decision of the Court of Appeals sought to be reviewed turns upon an appreciation of the particular facts involved, including the inferences to be drawn from the evidence, a petition for certiorari lacks substantial grounds for review by this Court. *General Talking Pictures Corp.*

v. Western Electric Co., 304 U. S. 175, 58 S. Ct. 849, 82 L. Ed. 1273.

Manifestly, the petitioners do not assert any conflict of decisions within the circuits nor raise a question of first impression. The issue raised by petitioners does not warrant review by this Court. This is not a decision where the lower courts have so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

ALLEN E. SUSMAN,
444 United California Bank Bldg.
9601 Wilshire Blvd.
Beverly Hills, California 90210

WARREN K. UBBOM,
1200 Sharp Building
Lincoln, Nebraska 68508

Attorneys for Respondents.